No. 21139

United States
COURT OF APPEALS
for the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

On Appeal from the United States District Court for the District of Oregon

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered May 8, 1966. The action was commenced by appellee Margaret Hackelman against appellant Reliance National Life Insurance Company in the United States District Court for the District of Oregon. Appellee's complaint asked $11,750.00 damages for fraud and deceit, and appellant denied any liability. Appellee is a resident of the state of

Oregon; appellant is a corporation organized and existing under the laws of the state of Utah. Jurisdiction is based upon 28 USC 1332(a)(1).

STATEMENT OF THE CASE

This is an action brought by appellee Margaret Hackelman for $1,750.00 general damages and $10,000.00 punitive damages for fraud and deceit. Appellee alleged that she bought a life insurance contract from appellant Reliance National Life Insurance Company because of the false and fraudulent representations of appellant's agent, William J. Burchfield, to the effect that:

1. Appellee would be purchasing a proprietary interest in appellant company,

2. Appellee would be "investing" in appellant company, and

3. Appellee would realize substantial income from this investment in the near future.

The lower court found the aforesaid "false representations" to have been made, and assessed general damages as prayed for by appellee less a credit for an annuity payment made by appellant to appellee. Punitive damages were not allowed.

In July, 1963, appellant's agent Burchfield called upon appellee at her home near Prineville, Oregon. At that time, appellee agreed to purchase two of aappellee's policies (Def's. Exs. 12-13), one insuring her life and another the life of her granddaughter Twila Wilson. Ap-

pellee paid Burchfield a $500.00 premium for those policies (Tr. 9). The policies were issued effective September 4, 1963 (Def's. Exs. 12, 13). In January, 1964, Burchfield again called on appellee and solicited from her an application for an additional policy and a premium of $1,250.00 thereon (Tr. 11). This policy was issued effective January 21, 1964 (Def's. Ex. 14). The foregoing policies all provided for life insurance, dividends from earned surplus, accruing cash surrender values, and for a guaranteed annual annuity. Appellee received an annuity payment of $288.35 on March 3, 1964 (Def's. Ex. 18). Sometime around July of 1964, agents of the Investors Insurance Company of Oregon called upon appellee, deprecated appellant's policies and advised appellee that their company's policies were better than appellant's (Tr. 53-4). Appellee thereafter ordered six policies from those agents (Tr. 55). made no further payments on her policies with appellant, and thereafter brought this action.

QUESTIONS PRESENTED

1. Whether there was any evidence of representations that appellee would have a proprietary interest in appellant company.

2. Whether the statements made by appellant's agent regarding an "investment" by appellee and regarding dividends to be received by appellee were in fact false representations.

3. Whether appellee was actually misled by appellant's agent as to the nature of her purchase.

SPECIFICATION OF ERRORS

1. The district court erred in failing to dismiss appellee's complaint.

2. The district court erred in finding that appellant's agent made false representations to appellee.

3. The district court erred in finding that appellee was misled by representations of appellant's agent.

4. The district court's findings of fact VII and VIII are clearly erroneous; no misrepresentation was made.

5. The district court erred in concluding that appellee had sustained the burden of proof.

6. The district court erred in denying appellant's motion for a new trial and for amendment of the findings of fact, conclusions of law and judgment.

SUMMARY OF ARGUMENT

Appellant's agent told appellee she would receive dividends. The contract delivered provides for dividends, and there is no evidence that she would not have received the same as provided in the contract had she maintained the contract.

The only evidence concerning representations by appellant's agent with regard to the nature of appellee's purchase consists of appellee's rather vague testimony that the agent described this plan as an "investment." Proof of fraud must be clear and convincing, and of a high degree of cogency. The foregoing testimony is in-

sufficient to prove any representation that appellee would acquire a proprietary interest in the company. Furthermore, in view of the dividend, cash value and annuity features of the contract, use of the word "investment" by appellant's agent is not fraudulent. The applications, forms, policies and other materials exhibited to appellee, read to her, signed by her and retained by her are so clearly referrable to a life insurance contract that appellee could not have been misled as to the nature of her purchase.

ARGUMENT

1. There was no evidence of a representation that appellee would have a proprietary interest in the company.

Appellee did not testify that Burchfield told her she would have a proprietary interest in the company, nor do any of the exhibits contain such a representation. Appellee's rather vague testimony that "he said we could invest" (Tr. 7), etc., hardly constitutes a basis for a finding that appellant's agent "falsely represented to the plaintiff that she was purchasing company ownership policies." The only direct evidence on the point is the testimony of Burchfield as follows:

> "Q. And you represented to her that this was an investment in your company; isn't that right?
> A. No, Sir." (Tr. 73)

> "We repeat the statements made in several of our previous decisions, that a party who alleges fraud has the burden of proof and that nothing short of a *high degree of cogency* will suffice." *Bel-*

anger v. *Howard,* 166 Or. 408, 414, 112 P.2d 1022, 1024 (1941).

Evidence of fraud must be "clear and satisfactory." *Metropolitan Casualty* v. *Lesher,* 152 Or. 161, 167, 52 P.2d 1133, 1136 (1935), *Reinhardt* v. *Weyerhaeuser Timber Company,* 47 F. Supp. 335, 336 (D.C. Oregon 1942), affirmed 144 F.2d 278 (9th Cir. 1943).

2. There was no evidence that appellant's agent made any misrepresentations concerning dividends.

"He said we would receive dividends" (Tr. 8, see also similar testimony on Tr. 9, 16). This is the only evidence on the record concerning Burchfield's statements regarding dividends. Appellant sees no fraud: The contract issued (Def's. Exs. 12-14) provides for dividends at the end of the second policy year and annually thereafter (P. 6, Def's. Exs. 12-14). Appellee did not maintain the policy for two years, and there is no evidence that she would not have received dividends in due course. It is also possible that appellee's testimony that Burchfield told her that "we would receive dividends" may have reference to the guaranteed annuity feature of the contract (see rider following page 18 of Def's. Exs. 12-14). Burchfield no doubt explained to appellee that she would receive annual payments, and, in fact, she did, just as provided in the contract: On March 3, 1964, appellee received annuities totaling $288.35 (Tr. 42-3, Def's. Ex. 18).

There is no "clear and convincing" evidence of "a

high degree of cogency" that appellant's agent made any statements justifying a finding of a fraudulent misrepresentation "that she would realize substantial income from the investment in the future."

3. There was no evidence that appellant's agent made any misrepresentations concerning "investment."

Appellee testified that "he said we would invest" (Tr. 7), "we were to get investments" (Tr. 9), "I thought that they were investments all the time. That's the way they were represented to me" (Tr. 56). Appellant's agent readily admitted that he used the term "investment" in dealing with appellee. "It was investing in a life insurance policy" (Tr. 68). "It was an investment in a life insurance contract" (Tr. 73).

The use of the word "investment" in connection with the purchase of a contract of this sort is not fraud. The contract provides for a substantial guaranteed annual annuity (see rider following p. 6, Def's. Exs. 12-14) and for accumulating cash surrender values (pp. 8, 13, 14, Def's. Exs. 12-14).

In *Lynch* v. *Kerslake,* 173 N.W. 147 (Iowa 1919), the defendant maker of a note for a life insurance premium interposed a defense based upon fraud, alleging, among other things, that the plaintiff agent fraudulently stated "that it was not a life insurance policy, but an investment policy." The contract was a life insurance policy with a 20-year endowment. The court in finding for the plaintiff disposed of this defense as follows:

"The fourth allegation of fraud, to wit, that the

> defendant would receive an investment policy and not a life insurance policy, is of course a statement of a fact. *The issue is an investment and life insurance policy.* It is a 20-year endowment policy. The fruits of the policy would not depend entirely upon the life of the insured." (Emphasis supplied) 173 N.W. at 149.

In Re Leuthold's Estate, 324 P.2d 1103 (Wash. 1958), involving estate taxation, the court described a policy similar to that involved herein:

> "These policies were all level-premium, straight life policies. the cash value of which increased each year as specified therein.
>
> *"This type of policy is both an indemnity and an investment."* (Emphasis supplied) 324 P.2d at 1106.

The Washington court quoted a work by McLean on life insurance as follows:

> "The level-premium plan, in fact, introduces an entirely new element into the scheme of operation: the *invested fund formed by the excess payments.* . . . It is thus evident, as already pointed out, that *the plan is not pure insurance but rather a combination of a decreasing insurance with an increasing investment,* the two amounts being computed mathematically in such a way that in any year their sum is equal to the 'face amount' payable under the policy." (Emphasis supplied) 324 P.2d at 1106.

The word "investment" is commonly used in sales of items having *no* investment features whatsoever. For example, see advertisement by Art Metal, Inc. on p. 8D of

the September, 1966 issue of Fortune, proclaiming that their "executive chair" is a "solid investment." That is gilding the lily. However, it is certainly legitimate and natural for a salesman to use the word "investment" in connection with a policy containing the *genuine investment features* of the one involved herein.

Appellant does not contend that no fraud would have been committed if its agent had in fact led appellee to believe that she was purchasing a proprietary interest in the company. However, there is no colorable evidence, let alone "clear and convincing" evidence "of a high degree of cogency," of any statements or representations by appellant's agent upon which appellee could have formed such an impression; we have only appellee's somewhat vague recollection of the use of the word "investment." This is no basis for a finding of fraud.

4. Appellee was not in fact misled as to the nature of her purchase.

The demonstrable evidence of the dealings of appellee and appellant's agent indicate that the agent did not undertake to deceive appellee as to the true nature of her purchase, and that she could not have in fact been misled as to the nature of her purchase. The uncontroverted evidence is to the effect that:

(1) Appellee executed applications to appellant (Def's. Exs. 1, 2, 4) after designating a "beneficiary" and "contingent beneficiary" and supplying information as to her health. Mr. Burchfield read the questions to her, and she supplied the answers (Tr. 22, 82).

(2) Appellee signed amendment of application forms (Def's. Exs. 5-7) which contain numerous plainly visible references to the "policy."

(3) Appellee received a letter from appellant (Pl. Ex. 1) which describes the policy in terms which leave no room for a supposition that the policyholder is an investor in the company in the sense appellee claims to have understood.

(4) Appellee took a physical examination (Tr. 36).

(5) Appellee signed a form entitled "Answers Made to the Medical Examiner" (Def's. Ex. 9) which contains answers to questions relating to health, answers to questions clearly relating to insurance (see Questions 9, 14), and a certification that appellee understood that the answers might be "considered the basis of any insurance issued hereon."

(6) Appellee received the policies, which could not more plainly be policies of insurance (see the plain references in the opening page of Def's. Exs. 12-14 to "Policy Number," "Insured," "AMOUNT OF INSURANCE," "First ANNUAL Premium," "PREMIUM TABLE," etc.).

It is possible that appellee did not entirely understand the nature of her contract with appellant; appellant certainly does not contend that appellee is learned in insurance terminology. However, it seems unlikely indeed that a woman who owns and operates a 13,000-acre cattle ranch with a thousand head of stock, and who had previously purchased and owned life insurance (Tr. 15), could be subjected to all the foregoing and yet

believe that her purchase here was entirely an investment in the company in the strict sense of the word.

CONCLUSION

It is not unreasonable to suggest that appellee's troubles stem not from what appellant's agent told her, but from the advice she received from appellant's competitors. Appellee was apparently satisfied with her policy and the annuity received thereon until July 1964, when she was called upon by representatives of Investors Insurance Corporation of Oregon (Tr. 54, 62). These representatives called on appellee twice and sold her six policies after telling her that appellant's policies "weren't any good" and that "their's were better" (Tr. 54). Appellee admitted on cross examination that she did not conclude that appellant's agent had misrepresented appellant's contracts until the second visit of Mr. Westphal of Investors Insurance Corporation of Oregon (Tr. 53).

Whatever the source of appellee's dissatisfaction, and whatever she now conceives her understanding of appellant's policies to have been, the fact remains that there is no "clear and convincing" evidence "of a high degree of cogency," or even reasonably competent evidence, that appellant's agent made fraudulent misstatements of fact.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellant